BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102

OPPOSITION AND COMMENTS TO PETITIONS FOR RECONSIDERATION OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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Pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. §1.429(f), the Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Opposition and Comments in the above captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

In the E911 Second Report and Order, the Commission closed an important chapter in its E911 implementation proceeding for CMRS. In so doing, the Commission has taken steps to improve access to emergency services via wireless communications by requiring carriers to deploy technology that should ultimately increase the number of calls that reach 911 during an emergency. The record upon which the Commission's decision was based was initiated in

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

2 Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Second Report and Order*, FCC 99-96, 13 COMM. Reg. (P&F) 1 (rel. June 9, 1999) ("E911 Second Report and Order").

response to a petition for rulemaking filed in 1995.[3] By permitting carriers to select among a variety of technology options, the Commission properly balanced the public safety concerns raised in the record and the carriers' interest in providing the best access to emergency services to their subscribers.

Very late in the process, years after comments were due to be filed on this matter, the Independent Cellular Services Association ("ICSA") submitted a letter requesting that the Commission modify its rules to permit more than one wireless handset to be programmed with the same Mobile Identification Number ("MIN") and Electronic Serial Number ("ESN"), ostensibly to improve public safety.[4] The ICSA reasoned that if it and its members are permitted to clone cellular phones, consumers would then install older, larger, and more powerful 3 watt telephones in their cars while owning a second, handheld wireless telephone. The ICSA argued that this would improve access to 9-1-1. In response, CTIA explained to the Commission that the ICSA

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[3] See Revision of the Commission's Rules to Ensure Compatibility with E9-1-1 Emergency Calling Systems, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 18676, at ¶ 20 ("E911 Report and Order"). In the E911 Report and Order, the Commission denied the strongest signal petition and sought further comment based on its tentative conclusion that a "user can manually change this default setting [of a cellular handset] to access the strongest signal from either of two cellular carriers regardless of subscription. . . . [M]anufacturers of cellular handsets would have to modify the default settings of these units [so that t]he handsets could then automatically route 911 calls to the strongest signal." Id. at ¶ 148.

[4] See Revision of the Commission's Rules to Ensure Compatibility with E9-1-1 Emergency Calling Systems, CC Docket No. 94-102, *Ex Parte* Presentations of the Independent Cellular Services Association (filed October 6, 1998 and September 17, 1998) ("ICSA *ex parte*").

attempt to cloak its cloning efforts under the cover of "public safety" was defective because 1) cloning a MIN/ESN is not needed to dial 9-1-1 in an emergency; and 2) the proposal is illegal.[5]

The Commission did not grant the ICSA its requested relief. As a result, the ICSA has filed a petition for reconsideration,[6] but has offered nothing new to suggest that the Commission should alter its decision. As explained below, the Commission should deny the request summarily for both procedural and substantive defects.

CTIA also addresses herein its support for the petition for reconsideration filed by Ericsson, Inc. Ericsson requests that the Commission modify the E911 Second Report and Order so that it is applicable only to mobile phones for which a new equipment authorization is filed subsequent to February 13, 2000.[7] CTIA supports Ericsson's request because 1) the record does not support a nine month implementation schedule; 2) it is infeasible for manufacturers to alter the design of their products in the middle of the product's life-cycle; and 3) the impact to the public of changing the rule would be minimal.

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5 See Revision of the Commission's Rules to Ensure Compatibility with E9-1-1 Emergency Calling Systems, CC Docket No. 94-102, *Ex Parte* Presentation of the Cellular Telecommunications Industry Association (filed November 20, 1998) ("CTIA *ex parte*").

6 Petition for Reconsideration from the Independent Cellular Services Association and Celltek and MT Communications, CC Docket No. 94-102 (filed July 28, 1999) ("Petition").

7 Petition for Reconsideration of Ericsson, CC Docket No. 94-102, at 2 (filed July 28, 1999) ("Ericsson Petition").

II. THE ICSA PETITION IS PROCEDURALLY DEFECTIVE AND DEVOID OF ANY BASIS FOR LIFTING THE BAN ON CLONED WIRELESS PHONES.

A. The Commission Should Reject The Petition As An Improperly Filed Petition For Rulemaking Or An Untimely Filed Petition For Reconsideration Of An Unrelated Matter.

Ignoring the basic procedural requirements of the Commission's rules, the ICSA has filed what it terms a Petition for Reconsideration. Under Section 1.429, 47 C.F.R. § 1.429(c), a "petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken should be changed." The Petition, however, plainly fails to identify which parts of the E911 Second Report and Order should be reversed. In fact, the ICSA states that its "Petition for Reconsideration is not directed to overturn or take exception with the basic order but rather to request that additional rulings be made to improve wireless 911 safety. . . ."[8]

The additional rulings the ICSA seeks are 1) a requirement that carriers and manufacturers initiate an education campaign about the technology options resulting from the E911 Second Report and Order; and 2) the lifting of the ban on wireless phone cloning. Clearly, the Petition more closely resembles a petition for rulemaking, or at the very least, an untimely filed petition for reconsideration of the Commission's 1994 order prohibiting cloning of Electronic Serial Numbers (ESN) in cellular handsets.[9] As such, it should be summarily rejected.

The apparent intent of the ICSA is to convert this public safety proceeding into a vehicle that will allow its members to engage in cellular phone cloning activity. In order to realize its

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[8] Petition at 3 (emphasis added).

[9] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, *Report and Order*, 9 FCC Rcd. 6513, at ¶¶ 54-63 (1994) ("ESN Order").

end-run around the Commission's prohibition against cloning, the ICSA invents a claimed need for a consumer education and awareness program regarding the technology options resulting from the E911 Second Report and Order.[10] This request is baseless and should be rejected by the Commission.

The proposed consumer education campaign is a request for an additional new rule that is improperly raised in a petition for reconsideration, has not been subject to notice and comment, and is without merit. The Petitioner has not explained why its proposal for a consumer awareness program was not submitted prior to adoption of the E911 Second Report and Order, considering that it had participated in the proceedings that resulted in the order and it could have offered its proposal then. To adopt such a requirement now, based on the Petition and without proper notice and comment, violates the requirements of the APA and the principles of the Commission's rules which generally prohibit new information from being presented in petitions for reconsideration.[11]

Moreover, there is no basis to conclude that a consumer awareness and education campaign explaining the three options set forth it the E911 Second Report and Order is warranted. As the petitioner itself notes, a large number of CMRS subscribers purchase wireless services because of the added safety and protection they provide.[12] To the extent the requirements of the E911 Second Report and Order result in improved call completion in the

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10 Petition at 7-9.

11 See 5 U.S.C. § 553; 47 C.F.R. § 1.429(b) ("A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under" limited circumstances -- none of which are present here.).

12 Petition at 4.

event of an emergency, it is likely that carriers and manufacturers themselves, without Commission intervention, will intensify marketing efforts to explain the added public safety benefits their cellular handsets will offer. In fact, ICSA makes no attempt to show why its proposal is even necessary. Like other proposals in this proceeding, a consumer education campaign about the E911 Second Report and Order is a solution in search of a problem.[13] The Commission should refuse to engage in this manner of rulemaking.

The only relevant argument raised in the Petition is the ICSA's claim that the Commission did not address its comments prior to adopting the E911 Second Report and Order.[14] Although ICSA argues that no mention was made of its *ex parte* presentations, the Commission did in fact note that "ICSA (a group of small cellular companies seeking Commission approval of cellular extension telephones)" supported the strongest signal proposal.[15] The Commission, however, could not have provided more analysis on the ICSA's consumer awareness campaign because the issue was not before it at that time.[16] The D.C. Circuit has held that "in assessing the reasoned quality of the agency's decisions, we are mindful that the notice-and-comment provision of the APA, see 5 U.S.C. 553(c), 'has never been interpreted to require [an] agency to respond to every comment, or to analyse [sic] every issue or alternative raised by comments, no matter how

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13 See Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted) ("regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.").

14 Petition at 5, 9.

15 E911 Second Report and Order at ¶ 47.

16 Of note, the Commission recognized that the actual intent of the ICSA was to use the strongest signal proceeding as a basis for seeking reversal of the prohibition on cellular phone cloning.

insubstantial.'"[17] Rather the Commission need respond only to those "comments which, if true, . . . would require a change in the agency's proposed rule."[18] Because this matter is unrelated to the strongest signal issue, there was no need for the Commission to address it.

B. ICSA's Proposal For Expansion Phone Technology Is Illegal Under The U.S. Criminal Code, Contrary To The Commission's Rules, And Unnecessary To Improve 911 Call Completion On Wireless Handsets.

Recognizing that the Commission's 1994 ESN Order bans cellular phone cloning, the ICSA has sought to bootstrap into this proceeding the right to clone phones under the guise of public safety. There is no basis, however, nor statutory authority, under which the Commission could revisit its prohibition. In response to the ICSA *ex parte*, CTIA explained that the "Wireless Telephone Protection Act"[19] made it clear that possession of equipment which is used to modify the MIN or ESN of a cellular telephone so that it may be used to obtain unauthorized cellular service is illegal.[20] ICSA's response in its Petition is to restate the same congressional statements it provided in its 1998 *ex parte* letters. The restatements, however, miss the point of the congressional colloquy -- even if the Commission were to change its rules to permit ICSA's proposal, the U.S. criminal code would still prohibit the conduct until (and unless) Congress were to repeal section 1029(a)(9) of Title 18.[21] In other words, the Commission is without authority to decriminalize that which Congress has prohibited.

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17 Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984) (citations omitted).

18 ACLIJ v. F.C.C., 823 F.2d 1554, 1581 (D.C. Cir. 1987) (emphasis omitted) (quoting Home Box Office at 35, n.58).

19 Codified at 18 U.S.C. § 1029(a)(9).

20 CTIA *ex parte*, at 1, n.2.

21 See Petition at Attachment 5 (quoting Senator Leahy).

ICSA asks the Commission to ignore the clear language of the statute with the apparent assurance that "[d]epending on the action taken by the Commission, the Congress is willing to amend the law if necessary."[22] Even if so inclined, and supported by a factual record, the Commission is not free to overturn the statute. It would be unprecedented for the Commission to amend its rules to permit conduct that Congress has criminalized. The Commission alone is incapable of granting the Petitioner's request. Congress would have to amend the U.S. Code to grant the Commission authority to do so. No amount of assurances by ICSA can alter this legal standard.

The Petitioner also erroneously believes that the Commission must lift its cloning ban so that consumers interested in installing older, higher wattage cellular phones in their cars for the purpose of improving access to emergency services can do so. CTIA addressed this argument in its November, 1998 *ex parte*. As explained therein, cloning MINs is not a prerequisite to installing cellular car phones for use in emergency situations. Consumers interested in installing cellular car phones may do so without having to purchase service for that second phone in order to reach 9-1-1 because the Commission's E911 rules require carriers to transmit all 9-1-1 calls without validation.[23] Thus, emergency calls from cellular car phones, regardless of their subscription status, will be transmitted when 9-1-1 is dialed.

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22 Petition at 18.

23 Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Memorandum Opinion and Order*, 12 FCC Rcd. 22665, at ¶ 33 (1997) ("E911 Memorandum Opinion and Order").

In response ICSA agrees. Specifically, it states that "CTIA is correct that [sic] wireless customer can use an unsubscribed phone to call 911."[24] However, the Petition goes on to state that "our member[s'] marketing experience plus common sense show that customers are not going to the expense and trouble to install a phone in a car when they [cannot] make regular phone calls."[25] The Commission has previously concluded otherwise. It has noted that certain consumers may indeed wish to obtain cellular telephones without purchasing service solely for emergency access and concluded that the benefits of such access enhances public safety.[26] Indeed, this finding was an important predicate to the Commission's order. Thus, the problem ICSA is attempting to resolve, has already been addressed and solved by the Commission, without resort to illegal cloning.

Finally, the petitioner misstates and attempts to confuse the Commission's intent when it banned ESN cloning.[27] Although not germane to this proceeding, its is important to note that the Commission, like Congress, did indeed intend to prohibit the activity advocated by the Petitioner. In the ESN Order, the Commission could not have been any clearer.

> [W]e conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; (3) such altered phones not authorized by the carrier, would therefore not fall

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24 Petition at 16.

25 Id.

26 E911 Memorandum Opinion and Order at ¶ 35.

27 See Petition at 12.

within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act.[28]

In response the cloners simply "disagree with paragraph 60 . . . ."[29] Their disagreement, however, is not a basis for Commission reconsideration. ICSA's concerns were raised in opposition to the ESN Order and are properly limited to that proceeding. The petitioner improperly seeks to use this proceeding, and the public safety benefits the Commission has sought to foster, to obfuscate its true intent -- to bypass a statutory and regulatory prohibition on cellular phone cloning. The Commission should reject these efforts and deny the Petition.

III. THE COMMISSION SHOULD AMEND SECTION 22.921 OF ITS RULES TO BE APPLICABLE ONLY TO NEW WIRELESS HANDSETS FOR WHICH EQUIPMENT AUTHORIZATIONS ARE FILED AFTER FEBRUARY, 2000.

CTIA supports Ericsson's request that the Commission clarify the compliance deadline for handset manufacturers and to otherwise refine its rules. In the E911 Second Report and Order, the Commission adopted a nine month deadline by which analog cellular handset manufacturers would have to comply with the terms of the order. As the Commission explained, "[t]he Alliance proposed a six month deadline. . . . [T]he wireless industry in fact requested a 12 to 18 month period . . . [but] a nine month deadline should allow manufacturers to make the programming changes in handsets, test the updated handsets, and revise the handset manuals."[30] Ericsson notes, however, that there was no credible basis in the record to support the Commission's conclusion.[31]

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28 ESN Order at ¶ 60.

29 Petition at 12.

30 E911 Second Report and Order at ¶ 87.

31 Ericsson Petition at 2.

In fact, there was no discussion in the record, or any explanation in the E911 Second Report and Order, addressing the technical nature of handset changes, handset testing, or rewriting of handset manuals which could lead the Commission to conclude that these modifications could be accomplished within nine months. Without such a basis, the nine month deadline is unsustainable under basic principles of administrative law. The Supreme Court has made it clear that, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[32] Because there were no facts in the record that would support a nine month implementation schedule, the "choice made" by the Commission to do so fails to meet the fundamental requirement that it avoid arbitrary and capricious decisionmaking.

The Commission's nine month deadline should be modified to avoid imposing an unreasonably burdensome requirement on handset manufacturers. Ericsson explained that the present rule creates "disruptive changes to established manufacturing runs of existing equipment," by requiring manufacturers to make changes to already authorized equipment.[33] In a similar instance, when the Commission adopted its ESN rules for cellular handset manufacturers, it recognized that changing the design of products that have already received type acceptance from the Commission is "impractical."[34] Instead, it concluded that although ESNs would be an important added feature to promote cellular network security, it would only impose the requirement on a going forward basis. A similar result is warranted here.

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32 Motor Vehicle Mfr. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962)).

33 Ericsson Petition at 3.

34 ESN Order at ¶ 62.

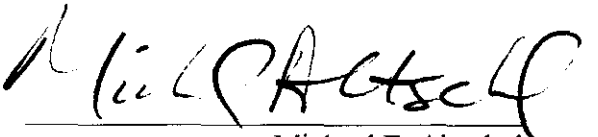
Not only would it be impractical and burdensome for the Commission to hold fast to the existing rule, the benefits of doing so would appear to be somewhat insignificant. Because the cellular industry is one of fast paced growth and technological change, handset design and handset product life-cycles are likely to be very short -- typically about 18 months. Most of the handsets that would fall under the Commission's existing rule (i.e. already authorized handsets that need to be modified) will likely be off the market in the very near future. The Commission's E911 Second Report and Order ensures that consumers will have the choice of selecting handsets with the additional 911 features within nine months. In other words, many of the handsets sold after the February, 2000 deadline will likely be type accepted under the Commission's rules after that date -- thus in compliance with the requirements of the E911 Second Report and Order. It is therefore with little beneficial consequence, yet great cost, that the Commission continue to maintain the section 22.921 in its existing form.

IV. CONCLUSION

For these reasons, CTIA respectfully requests that the Commission deny ICSA's Petition for Reconsideration and grant Ericsson's Petition for Reconsideration.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION



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CERTIFICATE OF SERVICE

I, Rosalyn Bethke, hereby certify that a copy of the foregoing Opposition and Comments to Petitions for Reconsideration of The Cellular Telecommunications Industry Association was delivered by first-class mail or by hand delivery, as indicated, upon the following:

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